UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 9
SAN FRANCISCO, CALIFORNIA

IN THE MATTER OF: Clement Okoh dba Ogiso Environmental, Ogiso Environmental, Inc., and City of Richmond, California RESPONDENTS	)	DOCKET NO. CAA-09-2001-0009

DEFAULT ORDER AND INITIAL DECISION

By Motion for Default Order filed August 6, 2002, Complainant, the Director of the Air Division, United States Environmental Protection Agency, Region 9, moved for a default judgment against Respondent Clement Okoh, dba Ogiso Environmental, and Respondent Ogiso Environmental, Inc. for a civil penalty under Section 113(d) of the Clean Air Act, 42 U.S.C. Section 7413(d), in the amount of twenty one thousand two hundred and five dollars ($21,205.00).

Pursuant to the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties at 40 C.F.R. Part 22, 64 Federal Register 40138 (July 23, 1999) and based upon the record in this matter and the following Findings of Fact, Conclusions of Law, and Determination of Penalty, Complainant's Motion for Default Judgment is hereby GRANTED. The Respondents, Clement Okoh dba Ogiso Environmental and Ogiso Environmental, Inc., are hereby found in default and a civil penalty is assessed in the amount of $21,205.00.

FINDINGS OF FACT

Pursuant to 40 C.F.R. §22.17 and the entire record in this matter, I make the following findings of fact:

1. Respondent City of Richmond owned the Former Modesto Tallow Site located at the Port of Richmond, Terminal No. 4, at the end of Western Avenue in the City of Richmond, California ("Site").

2. The Site consisted of several buildings and structures in various stages of disrepair. The Site contained several types of regulated asbestos-containing material ("RACM"), including approximately 500 square feet of boiler insulation and transite in excess of 200 square feet.

3. Pursuant to Section 112 of the Act, 42 U.S.C. § 7412, the Administrator promulgated regulations that govern the emission, handling, and disposal of asbestos. These emission standards are known as the National Emission Standards for Hazardous Air Pollutants ("NESHAP"). These asbestos NESHAP regulations are codified at 40 C.F.R. Part 61, Subpart M.

4. Respondent Clement Okoh ("Ogiso I") was an individual doing business as a sole proprietorship under the name Ogiso Environmental.

5. In or around April, 1998, Respondent City of Richmond hired Ogiso I to perform demolition activities at the Site.

6. Respondent Ogiso I was incorporated on April 30, 1999, and became Respondent Ogiso Environmental, Inc. (Ogiso II), a corporation incorporated in the state of California.

Complainant's Exhibit 8. Ogiso I and Ogiso II are together referred to as "Ogiso."

7. On or about July 27, 1998, Ogiso I began demolition activities at the Site.

8. On or about August 12, 1998, inspectors for the Bay Area Air Quality Management District ("BAAQMD") observed that transite at the Site had been extensively damaged by heavy equipment used to demolish the Site and that some pieces of transite had been pulverized into dust.

9. Pursuant to 40 C.F.R. § 61.145(a) and § 61.145(b), for a facility being demolished, each owner or operator must provide the Administrator with written notice of intent to demolish postmarked or delivered at least 10 working days before the start of demolition activity.

10. Respondents did not provide the Administrator with written notice of intent to demolish the Site before the demolition began on or around July 27, 1998.

11. Pursuant to 40 C.F.R. § 61.145(a) and § 61.145(c)(1), each owner or operator of a demolition activity involving the stripping of at least 160 square feet of RACM on facility components, excluding pipes, must remove all RACM from a facility being demolished or renovated before any activity begins that would break up, dislodge or similarly disturb the RACM.

12. On or about August 12, 1998, Ogiso I demolished the process unit at the Site without removing RACM consisting of boiler insulation.

13. Pursuant to 40 C.F.R. § 61.145(a) and § 61.145(c)(3), each owner or operator of a demolition activity involving the stripping of at least 160 square feet of RACM on facility components, excluding pipes, must adequately wet RACM during stripping operations.

14. On or about August 12, 1998, during the stripping of RACM consisting of boiler insulation surrounding the process unit at the Site, Ogiso I did not adequately wet the boiler insulation.

15. Pursuant to 40 C.F.R. § 61.145(c)(6), all RACM, including material that has been removed or stripped, must be kept adequately wet until collected and contained or treated in preparation for disposal in accordance with 40 C.F.R. § 61.150.

16. On or about August 12, 1998 and on or about August 20, 1998, BAAQMD inspectors determined that RACM consisting of boiler insulation and broken transite that had been removed or stripped was dry.

17. On or about August 12, 1998 and on or about August 20, 1998, Ogiso I failed to keep stripped or removed RACM consisting of broken transite and boiler insulation adequately wet until collected and contained or treated in preparation for disposal in accordance with 40 C.F.R. § 61.150.

18. Pursuant to 40 C.F.R. § 61.150(a), each owner and operator must discharge no visible emissions to the outside air during the collection, processing, packaging or transporting of an asbestos-containing waste material generated by the source.

19. On or about August 12, 1998, BAAQMD inspectors observed visible emissions coming from asbestos-containing waste material scattered on the ground at the Site, including transite which had been pulverized into dust.

20. On or about August 20, 1998, BAAQMD inspectors observed visible emissions coming from larger pieces of asbestos-containing waste material gathered together and other dry asbestos-containing waste material scattered over the ground at the Site.

21. On August 24, 2001 the Administrator of EPA, acting through her duly authorized representative, requested from the Department of Justice a waiver pursuant to Section 113(d)(1) of the Clean Air Act.

22. On September 27, 2001 the Attorney General, acting through his duly authorized representative, concurred with EPA's request for a waiver pursuant to Section 113(d)(1) of the Clean Air Act.

23. On September 28, 2001 a Complaint and Notice of Opportunity for Hearing was filed with the Regional Hearing Clerk. A Motion for Extension of Due Date for Answers and Request for Hearing, and a Second Motion for Extension of Due Date for Answers and Request For Hearing were filed with the Regional Hearing Clerk, and the deadline for filing Answers to the Complaint was extended to February 1, 2002.

24. The Complaint, and Motions, were served on Mr. Okoh and Ogiso II by certified mail. Complainant's Exhibit 1.

25. A return receipt for the Complaint, signed by Diane Williams and dated October 3, 2001, is on file with the Regional Hearing Clerk. Complainant's Exhibit 1.

26. Return receipts were received by the attorney for the Complainant showing that the first and second Motions for Extention of Due Date for Answer and Request for Hearing were received by Respondents Ogiso I and Ogiso II on October 19, 2001, and December 17, 2001, respectively. Complainant's Exhibit 1.

27. On December 12, 2001, the attorney for the Complainant had a telephone conversation with Mr. Clement Okoh in which she informed him of the new deadline for filing an Answer and in which he confirmed that he was aware the Complaint had been filed. Complainant's Exhibit 1.

28. Respondents Ogiso I and Ogiso II had notice and actual knowledge of the Complaint and the extended deadline for filing Answers to the Complaint. Complainant's Exhibit 1.

29. On May 30, 2002, Respondent City of Richmond and EPA entered into a separate settlement in which the City of Richmond agreed to pay a penalty of $26,145.

30. Respondents Ogiso I and Ogiso II have failed to file an Answer as authorized by 40 C.F.R. Part 22, with the Regional Hearing Clerk, Region 9, United States Environmental Protection Agency or send a copy to the U.S. Environmental Protection Agency, Region 9, or Margaret E. Alkon, attorney of record for said Complainant.

31. On August 6, 2002, Complainant filed a Motion for

Default Order with the Regional Hearing Clerk. Service on Respondents Ogiso I and Ogiso II was attempted by certified mail, but Respondents did not claim the document. Supplemental Memorandum in Support of Motion for Default Order, pp. 8 and 9. Subsequently, Complainant served the Motion by facsimile on September 9 and 10, 2002, after being authorized to do so by the Regional Judicial Officer pursuant to Section 22.5(b)(2) of the Consolidated Rules. Supplemental Memorandum in Support of Motion for Default Order, pp. 10 and 11.

32. As of the date of this Default Order and Initial Decision, Respondents have failed to respond to the Motion for Default Order.

CONCLUSIONS OF LAW

Pursuant to 40 C.F.R. § 22.17(c), and based on the entire record in this matter, I make the following conclusions of law:

1. The Consolidated Rules provide that an order of default may be issued "after motion, upon failure to file a timely answer to the complaint . . . . Default by respondent constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the complaint and a waiver of respondent’s right to contest such factual allegations." 40 C.F.R. § 22.17(a).

2. Respondent Ogiso I and Ogiso II's failure to answer the Complaint in this proceeding constitutes grounds for issuing the present order finding those Respondents in default.

3. Respondent Ogiso I and Ogiso II's default constitutes an admission of all facts alleged in the Proposed Administrative

Order, as described in the Findings of Fact above.

4. The Site is a “facility” as that term is defined by 40 C.F.R. § 61.141.

5. Respondents Ogiso I and Ogiso II are “persons” as that term is defined by Section 302(e) of the Act, 42 U.S.C. § 7602(e) and are an “operator of a demolition or renovation activity” as that term is defined by 40 C.F.R. § 61.141.

6. The boiler insulation and the damaged transite at the Site are “regulated asbestos-containing material”(“RACM”) as that term is defined by 40 C.F.R. § 61.141.

7. Respondents’ failure to provide the Administrator with written notice of intent to demolish the Site before demolition began constitutes a violation of 40 C.F.R. § 61.145(b).

8. Respondents’ failure to remove RACM prior to beginning demolition constitutes a violation of 40 C.F.R. § 61.145(c)(1).

9. Respondents’ failure to adequately wet RACM during stripping at the Site constitutes a violation of 40 C.F.R. § 61.145(c)(3).

10. Respondents’ failure to keep stripped or removed RACM adequately wet until collected and contained or treated in preparation for disposal in accordance with 40 C.F.R. § 61.150, constitutes a violation of 40 C.F.R. § 61.145(c)(6)(i).

11. Respondents’ failure to discharge no visible emissions to the outside air during the collection, processing, packaging or transporting of asbestos-containing waste material at the Site constitutes violation of 40 C.F.R. § 61.150(a).

12. When the Presiding Officer finds that a default has occurred, he shall issue a Default Order against the defaulting party as to any or all parts of the proceeding unless the record shows good cause why a default order should not be issued. If the order resolves all outstanding issues and claims in the proceeding, it shall constitute the Initial Decision. 40 C.F.R. §22.17(c). The present Default Order, which resolves all outstanding issues and claims in this proceeding, constitutes the Initial Decision in this matter.

13. As described in the "Determination of Penalty" section below, I find the Complainant's requested civil penalty of $21,205.00 is properly based upon the statutory requirements of the Clean Air Act and the cited EPA penalty policies.

DETERMINATION OF PENALTY

Under the Consolidated Rules, the Presiding Officer shall determine the amount of the civil penalty

> based on the evidence in the record and in accordance with any penalty criteria set forth in the Act. The Presiding Officer shall consider any civil penalty guidelines issued under the Act. The Presiding Officer shall explain in detail in the initial decision how the penalty to be assessed corresponds to any penalty criteria set forth in the Act . . . . If the respondent has defaulted, the Presiding Officer shall not assess a penalty greater than that proposed by complainant in the complaint, the prehearing exchange, or the motion for default, whichever is less.

40 C.F.R. § 22.27(b).

Section 113(e) of the Clean Air Act, 42 U.S.C. Section 7413(e), requires EPA to take into account in determining any penalty to be assessed, the size of the business, the economic

impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation as established by any credible evidence, payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, the seriousness of the violation, and such other factors as justice may require.

In the Complaint, Complainant proposed a penalty of $91,650.00 against Respondents Ogiso I and II and Respondent City of Richmond. Complainant's explanation of its calculation of the proposed penalty, as set out on pages 7 through 11 of the Complaint and in Complainant's Exhibit 24 (Affidavit of Robert Trotter) is incorporated herein by reference.

In the Motion for Default Order, Complainant requests a penalty against Respondents Ogiso I and Ogiso II of $21,205.00. Complainant's Memorandum of Points and Authorities in Support of Motion for Default Order contains an explanation of the penalty calculation as follows:

Section 113(d) of the Clean Air Act, 42 U.S.C. Section 7413(d), authorizes a civil administrative penalty of up to $25,000 per day for each violation of the Act provided that the total amount of penalty assessed does not exceed $200,000. These maximum amounts have been adjusted to $27,500 per day not to exceed a total penalty of $220,000, pursuant to the Civil Monetary Inflation Adjustment Rule at 40 C.F.R. Part 19.

The portion of the Complaint titled "Proposed Civil Penalty," incorporated herein by reference, describes how

Complainant determined the initial proposed civil penalty of $91,650 in accordance with Section 113(e) of the Clean Air Act, 42 U.S.C. Section 7413(e), and EPA's "Clean air Act Stationary Source Civil Penalty Policy" dated October 25, 1991, EPA's "Asbestos Demolition and Renovation Civil Penalty Policy" dated May 5, 1992, ("Asbestos Penalty Policy"), and the Civil Monetary Penalty Inflation Adjustment Rule, 40 C.F.R. Part 19.

In light of the City of Richmond's separate settlement, Complainant made three adjustments to the penalty proposed in the Complaint: (1) an adjustment to the size of violator factor; (2) a recalculation of the inflation adjustment; and (3) a reduction for the penalty paid by the City of Richmond. Complainant's Exhibit 24.

As part of the gravity component of the penalty calculation, EPA evaluates the net worth or net current assets of the alleged violator ("size of violator") to determine an appropriate adjustment for deterring future violations. In the Complaint, the net worth of the City of Richmond was utilized, and a size of violator adjustment of $46,000 was proposed. In light of the separate settlement by the City of Richmond, Complainant recalculated the penalty using the net worth of Ogiso, rather than the City of Richmond. The Complainant states that it has no information concerning the net worth of Ogiso I, but that the limited information available to it indicates that Ogiso II has a net worth of under $100,000. Complainant thus adjusted the "size of violator" penalty factor downward to $2,000. Adjusting the

recalculated gravity-based penalty of $38,500 upward by 10% pursuant to the Civil Monetary Penalty Inflation Adjustment Rule yields a new inflation adjustment of $3,800, and a total gravity penalty of $42,350. Combining $42,350 with the economic benefit portion of the penalty of $10,000 yields a recalcuated penalty of $52,350. Complainant adjusted this recalculated penalty downward by subtracting both the penalties which Ogiso has paid and the penalties paid by the City of Richmond attributable to the violation alleged in the Complaint. Thus, the penalty of $52,350 has been adjusted downward by subtraction of $5000 for penalties already paid by Ogiso and the City of Richmond to the Bay Area Air Quality Management District, and the penalty of $26,145 paid by the City of Richmond to the United States in this matter. The resulting penalty is $21,205.

I adopt the Complainant’s penalty analysis and find that a penalty of $21,205.00 against Respondents Ogiso I and II is appropriate in this case.

ORDER

Pursuant to the Consolidated Rules at 40 C.F.R. Part 22, including 40 C.F.R. §22.17, Complainant's Motion for Default Order is hereby GRANTED, and Respondents Clement Okoh, dba Ogiso Environmental, and Ogiso Environmental Inc. are hereby ORDERED to comply with all of the terms of this Order:

(1) Respondents Clement Okoh, dba Ogiso Environmental, and Ogiso Environmental Inc. are hereby assessed a civil penalty in the amount of twenty-one thousand two hundred and five dollars

($21,205.00) and ordered to pay the civil penalty as directed in this order.

(2) Respondents Clement Okoh, dba Ogiso Environmental, and Ogiso Environmental Inc., shall within thirty (30) days from the effective date of this Order, submit by cashier's or certified check, payable to Treasurer, United States of America, payment in the amount of **TWENTY ONE THOUSAND TWO HUNDRED AND FIVE DOLLARS ($21,205)** addressed to:

U.S. EPA, Region 9
P.O. Box 360863M
Pittsburgh, PA 15251

(3) In the event of failure by Respondents to make payment as directed above this matter may be referred to a United States Attorney for recovery by appropriate action in United States District Court.

(4) Pursuant to the Debt Collection Act, 31 U.S.C. § 3717, EPA is entitled to assess interest and penalties on debts owed to the United States and a charge to cover the cost of processing and handling a delinquent claim.

(5) Pursuant to 40 C.F.R. §22.27(c), this Order shall become effective forty-five (45) days after the initial decision is served upon the parties unless (1) a party appeals the initial decision to the EPA Environmental Appeals Board,[1] (2) a party

[1]Under 40 C.F.R. § 22.30, any party may appeal this Order by filing an original and one copy of a notice of appeal and an accompanying appellate brief with the Environmental Appeals Board within **thirty days** after this Initial Decision is served upon the

moves to set aside the default order that constitutes this initial decision, or (3) the Environmental Appeals Board elects to review the initial decision on its own initiative.

IT IS SO ORDERED.

Dated: February 5, 2003

[signed]
Steven W. Anderson
Regional Judicial Officer

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parties.